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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA

19 ALL NIPPON AIRWAYS COMPANY,
20 LTD.,

21 Plaintiff/Counter-Defendant,

22 vs.

23 UNITED AIR LINES, INC.,

24 Defendant/Counter-Plaintiff.

Case No. 07-03422 EDL

**DEFENDANT UNITED AIR LINES, INC.'S
REPLY TO ALL NIPPON AIRWAYS
COMPANY, LTD.'S OPPOSITION TO
UNITED'S MOTION TO COMPEL
DISCOVERY AND FOR ADDITIONAL
TIME TO DEPOSE WITNESSES**

DATE: March 11, 2008
TIME: 9:00 a.m.
CTRM: San Francisco
JUDGE: Elizabeth D. Laporte

25 Defendant/Counter-Plaintiff United Air Lines, Inc. ("United"), by its attorneys, Jaffe, Raitt,
26 Heuer & Weiss P.C., hereby submits the following reply to Plaintiff/Counter-Defendant All Nippon
27 Airways Company, Ltd.'s ("ANA") Opposition to United's Renewed Motion to Compel Discovery
28 and for Additional Time to Depose Witnesses:

I. INTRODUCTION

United has requested relevant and discoverable information which ANA has no basis to
continue to withhold. Most critically, United seeks production of ANA's cockpit voice recorder

1 (“CVR”) recordings. United has met the statutory standard for discovery of these recordings, and
2 ANA has offered nothing in its opposition papers to justify its refusal to provide this critical
3 discovery. Further, ANA has waived its objections to production of its Operations Manuals and the
4 documents it was required to keep on board its aircraft by failing to object within the time limit
5 allowed under the Federal Rules of Civil Procedure. Notwithstanding this failure, ANA concedes
6 that the materials United seeks are relevant and discoverable as it has requested the exact same
7 information from United. ANA cannot have it both ways, and must be compelled to produce all of
8 the documents United has requested without delay. Finally, once additional documents have been
9 produced, United should be permitted to continue the depositions of ANA’s flight crew, which were
10 impeded by the English-Japanese interpretation of all questions and answers, the pilots’ evasiveness,
11 counsel’s objections, and the fact that ANA did not produce many critical documents.

12 **II. ARGUMENT**

13 **A. CVR Recordings**

14 ANA’s assertion in its opposition papers that 54 U.S.C. § 1154 bars production of its CVR
15 recordings should be disregarded. It is telling that in its efforts to resist producing this information,
16 ANA could not site a single case supportive of its arguments. That is because those arguments are
17 baseless. Production of the CVR recordings is not only warranted, it is essential if United is to have
18 a fair opportunity to defend against ANA’s claim that the collision was caused by United’s
19 negligence. As discussed at length in United’s Memorandum of Points and Authorities in Support
20 of its Renewed Motion to Compel (Doc. No. 51), both § 1154 and the case law applying it fully
21 support United’s request for this critical evidence. Accordingly, production of the CVR recordings
22 should be ordered.

23 Under § 1154, a CVR recording must be produced following an *in camera* review if “(A) the
24 parts of the transcript made available to the public...and to the party through discovery...do not
25 provide the party with sufficient information for the party to receive a fair trial; and (B) discovery of
26 the cockpit or surface vehicle recorder recording is necessary to provide the party with sufficient
27 information for the party to receive a fair trial.” 49 U.S.C. § 1154(a)(3). As the statute makes clear,
28 *in camera* review of the CVR recordings is required as a preliminary matter. Thus, at a minimum,

1 ANA must be compelled to submit complete, unedited copies of the recordings to the Court for
2 review. Following this review, the recordings should be produced to United because both prongs of
3 § 1154(a)(3) have been met. Subsection A is undoubtedly satisfied because no complete transcript
4 of any of the CVR recordings has been made. Indeed, the only transcript that exists is a partial
5 transcript, created by ANA, of the Ramp Tower and Ground Control communications. (See Doc.
6 No. 52-17). The communications reflected in this incomplete transcript stop before the collision
7 even occurred, and the transcript contains no intra-cockpit communications. The transcript thus
8 sheds no light on the actions, or inactions, of ANA's pilots in the critical time frame immediately
9 before, during and after the accident. This partial transcript is plainly insufficient to afford United
10 an opportunity to fully examine what ANA's flight crew did or did not do to avoid the collision.
11 Further, as explained at length in its Memorandum of Points and Authorities, production of these
12 CVR recordings is essential if United is to receive a fair trial. Again, all United has from ANA's
13 CVR recordings is a partial and largely uninformative transcript. Without discovery of the
14 recordings, United will have no basis to challenge the ANA pilots' self-serving, after-the-fact stories
15 as to what occurred. *See, e.g., McCoy v. Southwest Airlines Company, Inc.*, 208 F.R.D. 617, 620
16 (C.D. Cal. 2002) ("[T]he tape may be used to impeach the pilots... whose recollection of the events
17 may be self-serving."). The CVR recordings provide the only objective, contemporaneous account
18 of what the flight crew saw and did in the moments leading up to the event and as it was taking
19 place. This information is critical to United's reconstruction and understanding of how the accident
20 occurred and, likewise, would be essential to a jury's understanding of the case in the event this
21 matter goes to trial.

22 ANA suggests that the purpose behind the statute militates against disclosure. This
23 assertion, while demonstrably false, misses the mark entirely. Courts "must look to the plain
24 language of a statute before attempting to divine the Congressional 'intent' behind that statute."
25 *Encuentro Del Canto Popular v. Christopher*, 930 F.Supp. 1360, 1364 (N.D. Cal. 1996). Where, as
26 here, the language of the statute is clear, "the sole function of the courts is to enforce it according to
27 its terms." *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026
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1 (1989)(citation omitted). Section § 1154(a)(3) provides a clear, unambiguous standard for discovery
2 of CVR recordings. Therefore, there is no basis for examining the statute's policy underpinnings in
3 determining whether the recordings should be produced. Rather, the Court need only look to the
4 plain language of § 1154(a)(3). Applying that language, United is entitled to production of the
5 recordings.

6 In any event, the statute's policy justification would not be undercut by disclosure of the
7 recordings. The primary purpose of the statute is to prevent litigants from interfering with an
8 ongoing NTSB investigation. See *Buschmann v. Little Rock National Airport*, 222 F.R.D. 114, 117
9 (N.D. Tex. 2004) ("The primary motivation behind the enactment of section 1154 was to prevent
10 private litigants from interfering with an ongoing NTSB investigation. Because the NTSB has
11 concluded its investigation of the crash and issued a final report, that concern is no longer an
12 issue.")¹ The NTSB has completed its investigation of this incident. Therefore, the Congressional
13 intent of § 1154 would not be undermined by production of ANA's CVR recordings.

14 ANA also argues that United's request should be denied because there is no United CVR
15 recording and it would be unfair for United to have ANA's CVR recordings when it will not be able
16 to get this evidence from United. However, nothing in the Federal Rules of Civil Procedure allows a
17 party to withhold relevant and discoverable information based solely upon a perceived disparity in
18 what is available to it. Further, if ANA believes it has been aggrieved by the fact that United
19 inadvertently did not preserve its CVR recording(s), it can ask the Court for an evidentiary
20 instruction. Depriving United of critical evidence is not the proper remedy.

21 United has met the statutory standard for discovery of ANA's CVR recordings. These
22 recordings are undoubtedly relevant, and United's ability to obtain a fair trial will be compromised if
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24
25 ¹ In its opposition brief, ANA accuses United of misrepresenting the purpose of the statute in
26 stating that its primary purpose is to prevent interference with NTSB investigations. ANA
27 would then also accuse the Honorable Jeff Kaplan, Magistrate Judge, United States District
28 Court for the Northern District of Texas, of misrepresenting the law when he stated in a
published opinion that "[t]he primary motivation behind the enactment of section 1154 was to
prevent private litigants from interfering with an ongoing NTSB investigation." *Buschmann*, 222
F.R.D. at 117. ANA's desperation to keep its CVR recordings concealed from both United and
the Court is evident in this untoward accusation.

1 this information is withheld. Consistent with the procedure set forth in § 1154, ANA should be
 2 ordered to produce copies of all of the CVR recordings for *in camera* review, after which, the
 3 recordings should be produced to United.²

4 **B. Operations Manual**

5 United seeks production of both the English and Japanese versions of the ANA Operations
 6 Manual as it existed on the date of the accident.³ Despite ANA's request for similar documents
 7 from United, and United's agreement to produce these documents⁴, ANA has produced only a few,
 8 hand-picked pages of its Manuals. ANA claims that but for the pages it produced, these Manuals
 9 are irrelevant. However, its own request for this information from United completely undermines its
 10 relevance argument. In any event, ANA has waived its relevance objection and any other objections
 11 to producing the Manuals by failing to assert them in a timely manner. Notwithstanding any
 12 objections, the Manuals are both relevant and discoverable and should be produced in their entirety.

13 Under Fed. R. Civ. P. 34(b)(2), a party "must respond in writing within 30 days after being
 14 served" with a request for production of documents. Where a party fails to timely respond, all
 15 objections are waived. *See, e.g., Morin v. Nationwide Federal Credit Union*, 229 F.R.D. 364, 367-
 16 68 (D.Conn. 2005)("[A] party 'is not free to raise in its brief - almost as an afterthought-entirely new
 17 objections which it did not assert earlier.' ... Instead, 'a party which fails to object to a discovery
 18 request waives any objections it otherwise might have made.'")(citations omitted). Well more than
 19 30 days have passed since United served ANA with its request for the Operations Manuals, and
 20 ANA has not served United with a written response objecting to the request. Therefore, ANA has
 21 waived its relevance objection and any other objections it might have had. Based upon this waiver,
 22 ANA must be compelled to produce complete copies of the requested materials.

23 Further, even if the Court is willing to entertain ANA's relevance argument, there is no
 24 question that the company's Operations Manuals fall within the broad scope of relevance under the
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26 ² The CVR recording may require interpretation, as it is possible that the ANA pilots were
 27 speaking in Japanese. United's interpreter can be made available to the Court if necessary.

28 ³ ANA has produced the current versions of its Operations Manuals.

⁴ United has already recreated and produced the version of its Operations Manual in existence on
 the date of the collision.

1 Federal Rules. Testimony elicited at the pilots' depositions shows the importance of this document.

2 Mr. Yamaguchi gave the following testimony regarding the Manual:

3 Q Do you know what an operations manual is? Are you familiar with that term?

4 A Yes.

5 Q What is an operations manual?

6 A It is a manual that explains how to do our work.

7 Q Okay. It's an ANA document; correct?

8 A Yes.

9 Q It sort of is the outline, if you will, of how the company and its employees are
10 expected to perform their duties including with regard to the operation of
ANA aircraft; correct?

11 A Yes.

12 Q And it's required that the manual be kept with the aircraft?

13 A Yes.

14 (Doc. No. 52-10, pp. 34-35). Further, Ieruo Usui testified that the flight crew "observed the
15 operation[s] manual and operate [sic] the aircraft based on it" and that if he is faced with a potential
16 conflict while taxiing, "I will act according to the operations manual." (Doc. No. 52-14, pp. 55, 58.
17 Yusuke Nishiguchi provided similar testimony. (Doc. No. 52-13, p. 13).

18 As the testimony of ANA's flight crew indicates, the Operations Manual is a comprehensive
19 document that governs all facets of the operation of the aircraft, and its importance is reflected by
20 the fact that ANA requires the Manual to be kept on board the plane. This Manual would contain
21 procedures for activating the CVRs, communicating with air traffic control, ground control and
22 ramp control, pull-back operations, taxiing, conflict resolution and a host of other issues directly
23 related to the case. Given its significance, it cannot seriously be disputed that ANA's Operations
24 Manual is relevant under Fed. R. Civ. P. 26(b)(1), as ANA concedes by its own request for United's
25 entire Manual. ANA disingenuously claims that it has offered to reconstruct any section of the prior
26 Manuals that "UAL reasonably believes is relevant to this matter." (Doc. No. 65, p. 8). However,
27 United obviously cannot determine which sections of the Manuals are relevant without knowing
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1 their contents. Therefore, United “reasonably believes” that the Manuals are relevant in their
2 entirety and that production should be ordered so that United may be permitted to examine them for
3 itself and make its own determination as to what pertinent information is contained therein, just as
4 ANA has been permitted to do by United’s production of these materials.

5 ANA did not timely object to producing its Manuals, and the relevance of those documents
6 cannot be disputed. ANA thus has no continuing basis to withhold this information. United is
7 entitled to complete copies of both the English and Japanese versions of the Operations Manual, not
8 just the handpicked pages produced by ANA.

9 **C. Other Documents Required To Be Kept On Board**

10 United has also requested production of all other documents ANA was required to have on
11 board the aircraft. Once again, ANA has conceded the relevance and discoverability of these
12 documents by serving United with an identical document production request. As with the
13 Operations Manuals, ANA did not object in writing to production of these materials within 30 days,
14 as required under Fed. R. Civ. P. 34. Accordingly, ANA has waived any objections to the request.
15 Further, as is clear from ANA’s opposition papers, ANA has not produced all documents responsive
16 to United’s request and has no legitimate basis to continue to withhold this information.
17 Accordingly, ANA should be compelled to produce these materials.

18 **D. Additional Time to Depose Pilots**

19 ANA’s opposition papers do nothing to refute United’s assertion that the depositions of the
20 ANA pilots were seriously impeded by the English-Japanese interpretation, the evasiveness of the
21 pilots, counsel’s disruptive and leading objections, and ANA’s failure to produce documents. The
22 necessity for full English-Japanese interpretation itself provides grounds for continuing the
23 depositions of the pilots. *See* 2000 Advisory Committee Notes to Fed. R. Civ. P. 30(d) (“Parties
24 considering extending the time for a deposition — and courts asked to order an extension — might
25 consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the
26 examination....”). As the DVDs submitted by United show, the depositions moved very slowly due
27 to the full interpretation. This interpretation drastically reduced the time available to counsel, and,
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1 again, these difficulties were compounded by the pilots' evasion, counsel's interruptions and the fact
2 that documents were not produced.

3 Further, there is no question that ANA's attorney unilaterally terminated the deposition of
4 Mr. Yamaguchi after only six and one-half hours of testimony, well short of the seven hours allowed
5 under Fed. R. Civ. P. 30(d)(1). United's attorney indicated that he had additional questions, but
6 ANA terminated the deposition anyway for no reason. (*See* Doc. No. 52-10, pp. 135-38). United is
7 entitled to finish deposing Mr. Yamaguchi. ANA also makes much of the fact that the depositions
8 of Mr. Usui and Mr. Nishiguchi did not last for the full seven hours allowed under the rule.
9 However, if the witnesses had provided responsive answers rather than evasive ones and if ANA had
10 produced documents United requested, United undoubtedly would have used all of the allotted time.
11 Considering the obstacles United faced, it was pointless to continue the depositions, each of which
12 took up one full day. The fact that there was less than seven hours of on-the-record time has no
13 bearing on United's request for leave to continue the depositions of Mr. Usui and Mr. Nishiguchi.

14 For these reasons, as more fully discussed in United's Memorandum of Points and
15 Authorities, United should be permitted to continue the depositions of ANA's flight crew.

16 **III. CONCLUSION**

17 For the reasons stated above and in United's Memorandum of Points and Authorities, United
18 respectfully requests that the Court **GRANT** this motion and enter an order (1) compelling ANA to
19 produce documents responsive to United's First Request to Produce and Notice and Amended
20 Notices of Taking Video Depositions, (2) granting United leave to continue the depositions of ANA
21 pilots Yusuke Nishiguchi, Eishin Yamaguchi and Teruo Usui, and (3) awarding United the costs and
22 fees it incurred in bringing this motion.

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UNITED STATES DISTRICT COURT
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ALL NIPPON AIRWAYS COMPANY,
LTD.,

Plaintiff/Counter Defendant,

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Case No. 07-03422 EDL

**DEFENDANT UNITED AIR LINES, INC.'S
(UAL) CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2008 I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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